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No. 86-1000

In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY WHEELER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that the formula established by the Office of Personnel Management's predecessor for determining the Fair Labor Standards Act overtime pay rates of federal firefighters complies with the requirements of that Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is unreported. The opinion of the United States Claims Court (Pet. App. B1-B30) is reported at 9 Cl. Ct. 579.

JURISDICTION

The final order of the court of appeals was entered on September 18, 1986. The petition for a writ of certiorari was filed on December 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT

The federal government, as employer, became subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, in 1974. The FLSA provides that an employee covered by the FLSA must receive overtime pay for all hours of work in excess of 40 hours per week "at a rate not less than one and one-half times the regular rate at

which he is employed." 29 U.S.C. 207(a)(1). In recognition of the fact that firefighters typically do not work a 40-hour week but, rather, generally are required both to perform work and to remain at their duty stations on standby during their work shifts, the 1974 amendments to the FLSA enacted a special overtime pay provision applicable to firefighters. That provision, 29 U.S.C. 207(k), states that firefighters should receive overtime pay for the hours they are on duty in excess of 216 hours in a 28-day period.[1]

Congress instructed the Civil Service Commission, predecessor to the Office of Personnel Management (OPM), to apply the FLSA in the federal sector consistently with its application by the Department of Labor in other sectors. H.R. Rep. 93-913, 93d Cong., 2d Sess. 28 (1974). In January 1975 the Commission issued Federal Personnel Manual (FPM) Letter No. 551-5 (Jan. 15, 1975), which provided instructions for applying the FLSA to federal firefighters. Because FLSA overtime pay is to be paid at the rate of one and one-half times the regular rate of pay, which the FLSA defines as "includ[ing] all remuneration for employment paid to, or on behalf of, the employee" (29 U.S.C. 207(e)), it was necessary for the Commission to establish a formula for computing firefighters' regular rate of pay. FPM Letter No. 551-5 instructed that firefighters' regular rate of pay is their General Schedule (GS) pay ("basic pay") plus the standby duty pay they receive pursuant to 5 U.S.C. 5545(c)(1) ("standby pay") during a work period divided by the number of hours per work period that the firefighter is

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[1]Section 207(k) also directed the Secretary of Labor to perform a study to determine the average number of hours worked by firefighters. The Secretary's study determined that firefighters averaged 212 hours of work per 28-day period in 1975. 48 Fed. Reg. 40518-40519 (1983). Accordingly, under the terms of the statute, federal firefighters are now entitled to overtime pay for all hours that they are on duty in excess of 212 hours in 28 days.

regularly on duty. For example, as the Claims Court explained (Pet . App. B16), the regular rate of pay for a GS-4, step 6 firefighter like petitioner Wheeler, who in 1980 received $451.20 in basic pay and $100.80 in standby pay for a two-week period, during which he was regularly scheduled to be on duty for 144 hours, was $3.83 per hour (($451.20 basic pay + $100.80 standby pay) / 144 hours). This formula is consistent with the Department of Labor's regulations, which provide that the regular hourly rate is to be determined "by dividing [the] total remuneration for employment (except statutory exclusions) in any work [period] by the total number of hours actually worked * * * in that work [period] for which such compensation was paid." 29 C.F.R. 778.109; see *Zumerling* v. *Devine*, 769 F.2d 745, 752 (Fed. Cir. 1985).

Under the instructions in FPM Letter No. 551-5, the amount of overtime pay due a firefighter is determined by multiplying half the regular rate by the number of overtime hours. Under this approach, the Claims Court explained (Pet. App. B17), petitioner Wheeler, who regularly was scheduled for 36 hours of overtime duty (144 hours - 108 hours = 36 hours) during a two-week period (see Pet. App. B19),[2] was entitled to $69 of overtime pay for that period (1/2 x $3.83 x 36 hours). Accordingly, he received $621 for each two-week period ($451.20 basic pay + $100.80 standby pay + $69 overtime pay) (Pet. App. B18).[3]

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[2]As the Claims Court noted (Pet. App. B16 n.5), as a result of a study by the Department of Labor firefighters are entitled to overtime pay for hours of duty in excess of 106 hours in a two-week period rather than for hours of duty in excess of 108. However, because the court used 108 in its calculations pertaining to petitioner Wheeler (see Pet. App. B17), we do also.

[3]In effect, the $621 received by petitioner Wheeler during a two-week period represents approximately $414 for 108 hours at his regular rate of $3.83 and $207 for 36 hours of overtime at the rate of $5.75 ($3.83 + (1/2 x $3.83)).

In *Zumerling* v. *Devine*, *supra*, the Federal Circuit upheld the calculation method set forth in FPM Letter No. 551-5. It rejected the contention that the regular rate of pay should be calculated based on the number of non-overtime hours worked rather than the total number of hours worked, concluding that "it appears reasonable that the regular rate is to indicate the typical hourly wage paid, and OPM's equation merely reflects this fact" (769 F.2d at 751). It also rejected the contention that FPM Letter No. 551-5 conflicts with the statute because it provides that the amount of overtime pay should be calculated by multiplying half the regular rate times the number of overtime hours of duty. The court explained that "[b]y receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed" for overtime work (769 F.2d at 752).

Petitioners are federal firefighters who raise the same contentions that the Federal Circuit rejected in *Zumerling* (see Pet. 12). The Claims Court recognized that the Federal Circuit had already decided this issue (Pet. App. B22) and rejected their challenge to the calculation method set forth in FPM Letter No. 551-5. The Federal Circuit affirmed by order, noting that the case was indistinguishable from *Zumerling* (Pet. App. A2).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. As the Federal Circuit recognized in *Zumerling*, the method set forth in FPM Letter No. 551-5 for calculating the overtime pay due firefighters is correct. The amount of basic pay due federal firefighters is determined by their GS level and the amount of their standby pay is determined by 5 U.S.C. 5545(c)(1), and petitioners do not disagree that

those amounts should be added in calculating a firefighter's regular rate of pay. Petitioners contend (Pet. 12) that OPM's predecessor erred by determining that to calculate the regular rate of pay the divisor should be the total number of hours of duty in a work period; in petitioners' view the divisor should be the number of non-overtime hours worked during the work period. Petitioners also contend (*ibid.*) that, rather than multiplying the regular rate by one-half and multiplying that by the number of overtime hours worked, the number of overtime hours worked should be multiplied by one and one-half times the regular rate to determine the amount of overtime pay due.

Petitioners' contentions are wrong. Rather than resulting in an accurate calculation of the amount of overtime pay due, their proposed method would result in a windfall to firefighters. First, the proper starting point for determining how the FLSA should affect federal firefighters is to calculate what the firefighters' actual hourly rate of pay was prior to the application of the FLSA. Dividing the pay the firefighter then received by the total number of hours of duty for which that pay was received, as FPM Letter No. 551-5 requires, is a perfectly straightforward way of determining the regular rate of pay that accurately reflects what federal firefighters earned per hour prior to the application of the FLSA to the federal government. It is also consistent with the Department of Labor's regulations. 29 C.F.R. 778.109. Second, multiplying the regular rate of pay by one-half and then multiplying that by the number of overtime hours worked plainly results in pay at the rate of one and one-half times the regular rate for overtime hours worked. The method devised by OPM's predecessor thus accurately gives effect to Congress's purposes in applying the FLSA to the federal government. Under the calculation method set forth in FPM Letter No. 551-5, federal firefighters' wages are increased so that they are paid at the rate of one and

one-half times the regular rate for the overtime hours they work.[4]

In contrast, petitioner's proposed method of dividing the basic pay plus the standby pay by the number of non-overtime hours worked to determine the regular rate does not accurately reflect the typical hourly wage earned by federal firefighters prior to the application of the FLSA to the federal government, but instead artificially inflates the average hourly wage. Under petitioners' proposal, a federal firefighter such as Wheeler would be treated as if, absent the FLSA, he had earned $5.11 per hour for the 108 hours of non-overtime worked each pay period (($451.20 basic pay + $100.80 standby pay) / 108 hours) and nothing for the additional 36 hours normally worked (see Pet. App. B20). That is surely not an accurate reflection of how he was paid. It was devised merely because the use of an inflated regular rate would result in approximately $212.21 extra every two weeks for employees such as petitioner Wheeler compared with the formula set out in FPM Letter No. 551-5 (see Pet. App. B20-B21). Under petitioners' proposal, rather than receiving one and one-half times their pre-FLSA hourly rate for each hour in excess of 108 hours of duty every two

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[4]The point can be illustrated by the example of an employee who worked 50 hours per week before the FLSA became applicable to him and who, after the FLSA became applicable, continued to work 50 hours per week, of which 40 hours are deemed (by the FLSA) to be regular time and ten hours are overtime. If the employee's pre-FLSA weekly salary was $200 per week, then he clearly was paid at the rate of $4 per hour. After application of the FLSA, he would have to be paid at the overtime rate of one and one-half times the regular rate for the hours worked in excess of 40 hours per week. Thus, after application of the FLSA, he would be paid $4 per hour for 40 hours and $6 per hour (1-1/2 x $4) for 10 hours, for a total of $220. That could also be calculated, under the formula provided in FPM Letter No. 551-5, as the regular rate times the total number of hours worked ($4 per hour x 50 hours) plus one-half the regular rate times the number of overtime hours worked ($2 x 10 hours).

weeks, petitioners would receive (a) more pay for each regular hour than they received before the FLSA applied, and (b) one and one-half times that enhanced amount for each overtime hour. But the FLSA does *not* require (as petitioners' formula would imply) that a firefighter who previously was on duty for 144 hours and received $552 is now entitled to receive $552 for 108 hours of duty; all it entitles them to is the pre-FLSA hourly wage plus one-half again for each hour of duty over 108.[5]

Even if the calculation method set forth in FPM Letter No. 551-5 were not plainly correct, it would warrant deference as "a contemporaneous construction of [an] Act by the officials charged with the responsibility of setting its machinery in motion" (*Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410 (1975); accord, *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (concerning the validity of a long-standing OPM regulation interpreting a federal pay statute)). FPM Letter No. 551-5 is a comprehensive document, covering all aspects of the entitlements of federal employees engaged in fire protection activities to overtime pay under the FLSA, that was issued at virtually the same time federal firefighters became subject to the FLSA. The Federal Circuit recognized that OPM's predecessor gave careful consideration to the statutory objectives of providing fair and reasonable compensation to federal firefighters,

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[5]To use the hypothetical example presented in note 4, *supra*, petitioners would say that the employee in that example earned $5 per hour for 40 hours per week prior to the application of the FLSA and nothing for the additional 10 hours regularly worked. Under petitioners' proposal, after application of the FLSA, that employee should receive $200 for working a 40-hour week and be paid at the rate of $7.50 per hour for any additional work. Thus, if the employee worked a 50-hour week, he would receive $275 ($200 + ($7.50 x 10)). The flaw in that approach is that, prior to the application of the FLSA, the employee did not earn $5 per hour, but instead clearly earned $4 per hour.

concluding that "OPM's interpretive guidelines 'harmonize[s] with the statute's "origin and purpose," ' " as well as with the Secretary of Labor's regulations. *Zumerling*, 769 F.2d at 750 (brackets in original) (quoting *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)). The court of appeals in *Zumerling* further noted (769 F.2d at 753): "By promulgating the guidelines at issue in this case, OPM has met the challenge given it by Congress. It has administered the FLSA in a most difficult situation and has done so consistent with the Secretary of Labor's regulations."

2. Contrary to petitioners' contention (Pet. 15-17), the court of appeals' decision does not conflict with this Court's decisions in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945), and *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944). Neither of those cases involved firefighters. While the Court in those cases stated that "the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed" (*Youngerman*, 325 U.S. at 424 (citing *Helmerich*, 323 U.S. at 40)), it also recognized that not every employee is employed for 40 hours per week at a particular rate per hour. Thus, as to the employees in *Youngerman* who were employed on a piece-work basis, the Court held that the regular rate "coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked." 325 U.S. at 424 (citing *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 580 (1942)). The formula at issue instructs federal agencies to compute firefighters' regular rates in exactly the same manner.

Nor does the Federal Circuit's decision conflict with the Ninth Circuit's decision in *Oliver* v. *Mercy Medical Center, Inc.*, 695 F.2d 379 (1982), as petitioners also allege (Pet. 13-14). That case did not involve firefighters, but instead

involved an employee who worked for less than six weeks as an ambulance attendant (695 F.2d at 380). He contended that his salary was intended to cover a 40-hour workweek and that he was entitled to overtime pay for the additional hours that he was on call. His employer contended, to the contrary, that his salary was intended to compensate him for all hours that he worked or was on call. The court accepted the plaintiff's theory. While noting that arrangements such as the one the employer alleged are permissible under the Department of Labor's FLSA regulations, specifically 29 C.F.R. 778.114(a), it added that such arrangements are permissible only when there was a "clear mutual understanding," and it found no such understanding in that case (695 F.2d at 381 & n.4). The decision in *Oliver* thus turned on the Department of Labor's FLSA regulations and the intentions of the parties. The Department's FLSA regulations are not applicable here and the applicable instruction, FPM Letter No. 551-5, contains no requirement of a "clear mutual understanding" regarding firefighters' pay. The reason for that difference is obvious and reasonable. Federal firefighters such as petitioners do not bargain over their wages, which are instead established by statutes and regulations, so no mutual understanding is relevant. Moreover, the employer in *Oliver* attempted to rely after the fact on the Department of Labor's regulation authorizing the payment of a fixed salary for all hours worked when the parties agreed to such an arrangement, and it is not surprising that the court rejected that post hoc rationalization. This case involves no such post hoc rationalization. Rather, OPM's predecessor issued FPM Letter No. 551-5 detailing the procedure for determining the overtime pay of federal firefighters only 14 days after the FLSA became applicable to federal workers and long before this litigation ensued.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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